

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL J. CAPERTON,

Defendant-Appellant.

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UNPUBLISHED

March 5, 1999

No. 198471

Saginaw Circuit Court

LC No. 91-005590 FC

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

In February 1992, defendant was convicted by a jury of kidnapping, MCL 750.349; MSA 28.581, armed robbery, MCL 750.529; MSA 28.797, and unarmed robbery, MCL 750.530; MSA 28.798, for which he was sentenced to concurrent terms of life in prison, thirty to forty-five years and ten to fifteen years, respectively. He failed to seek appellate review within the time limits established in MCR 7.204 and MCR 7.205. More than two years later, defendant filed a motion for relief from judgment.<sup>1</sup> The trial court found that defendant failed to establish good cause for failing to raise the issues in a timely appeal or actual prejudice from the alleged irregularities, MCR 6.508(D)(3), and denied the motion. Defendant now appeals by delayed leave granted and we affirm.

MCR 6.508(D) provides in pertinent part:

The defendant has the burden of establishing entitlement to the relief requested.  
The court may not grant relief to the defendant if the motion

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(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(i) in a conviction following trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

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(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

We reject defendant’s claim that he should not be required to establish good cause and actual prejudice because he never had the benefit of seeking appellate review of his convictions and sentences. Defendant’s interpretation would require the court to ignore the plain language of the court rule and is without merit. Subchapter 6.500 is the only means for reviewing “a judgment of conviction and sentence entered by the circuit court . . . not subject to appellate review under subchapters 7.200 or 7.300 . . . .” MCR 6.501. The staff comment to that rule explains that subchapter 6.500 “provides the exclusive means to challenge convictions in Michigan courts for a defendant who has had an appeal by right or by leave, who has unsuccessfully sought leave to appeal, or who is unable to file an application for leave to appeal to the Court of Appeals because 18 months have elapsed since the judgment.”<sup>2</sup> The rule clearly encompasses a situation in which a defendant has failed to file a timely claim of appeal under MCR 7.204(A)(2), and failed to file a late application for leave to appeal within the time permitted under MCR 7.205(F)(3). Therefore, even though defendant never appealed his convictions and sentences, his only right to review was under subchapter 6.500 and thus he was obligated to comply with its requirements. *People v Caston*, 228 Mich App 291, 298; 579 NW2d 368 (1998).

The trial court erred to the extent that it ruled that defendant’s failure to establish good cause precluded review of his claim that the court had considered an uncounseled juvenile adjudication at sentencing. The collateral challenge to the prior conviction “raises a jurisdictional defect not subject to the ‘good cause’ or ‘actual prejudice’ demands of MCR 6.508(D)(3) . . . .” *People v Carpentier*, 446 Mich 19, 30; 521 NW2d 195 (1994). However, that error was harmless because the substantive claim itself is without merit. Defendant did not meet his burden of proving that the adjudication was taken without counsel or a proper waiver of counsel because he failed to present prima facie evidence of that fact, such as a docket entry showing the absence of counsel or a transcript of the hearing, and he failed to present evidence that he requested such records from the sentencing court and that his request was ignored or denied. *Id.* at 31. Moreover, even if defendant had met his burden of proof, the adjudication did not actually result in incarceration and, therefore, was not obtained in violation of his constitutional right to counsel. *People v Daoust*, 228 Mich App 1, 18-9; 577 NW2d 179 (1998).

Because defendant could have raised each of the remaining issues addressed in his motion for relief from judgment in an appeal, had he filed a claim of appeal or application for leave to appeal in a timely manner, he was required to show good cause for failing to seek appellate review in a timely manner. “Good cause requires a showing of some impediment external to the petitioner.” *Carpentier*, *supra* at 44 (Riley, J., concurring). It also “may be shown by ‘some objective factor external to the defense that impeded . . . efforts to comply with the State’s procedural rules.’” *Id.* at 44 n 1, quoting *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986). Good cause does not exist “when a delay occurs because of defendant’s own conduct or unwarranted behavior.” *Id.*

The trial court determined that defendant’s failure to seek appellate review in a timely manner “was a direct result of [his] own negligence” and thus he failed to establish good cause. The record shows that, after imposing sentence, the trial court advised defendant that if he wanted appellate counsel appointed, the request “must be made in writing and sent directly to the Court within 42 days.” Defendant was given the form for requesting counsel and signed and dated the form in the space under the heading “RECEIPT OF NOTICE OF APPEAL RIGHTS,” which was followed by the statement “On this day I received this form and financial schedule. I understand that I must return the completed form to the court within 42 days if I want an attorney appointed for my appeal.” The signature line was followed by the heading “REQUEST FOR APPOINTMENT OF ATTORNEY” and directed defendant to fill out the financial schedule on the back of the form and sign his name in the space provided if he wanted an attorney provided to him. It further advised that once he completed the request for appointment of attorney and financial schedule, “keep one copy for yourself and return the other copy to the court.” There was no claim that defendant did not receive his two copies of the form or that he could not read or understand its contents. His only claim was that he thought that he had requested appointment of counsel by signing the receipt even though he did not fill out the financial schedule or sign in the space for requesting appointment of counsel, an error which he could have realized had he simply read the form. Because the failure to seek appellate review in a timely manner was due to defendant’s own conduct, he failed to establish good cause as required under MCR 6.508(D)(3)(a). Therefore, the trial court did not err in denying the motion for relief from judgment.

Affirmed.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Stephen J. Markman

<sup>1</sup> Defendant alternatively sought a delayed motion for a new trial. However, such a motion could not have been filed more than eighteen (now twelve) months after entry of the judgment, MCR 6.431(A)(3); MCR 7.205(F)(3). Because defendant’s motion was filed after that time, he was not entitled to move for a new trial, but rather he could only seek relief under MCR 6.500 *et. seq.*

<sup>2</sup> This time limit was shortened to twelve months in November 1995.